United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted]674

No. 20,090

ALEXANDER H. UNDERDOWN

and

WILLIAM LAWS,

Appellants

vs.

UNITED STATES OF AMERICA,

Appellee

Appeal from the District of Columbia Court of Appeals

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STATEMENT OF QUESTION PRESENTED

Where the statute authorizing the issuance of a search warrant for alcoholic beverages provides that the warrant shall command forthwith a search, and the warrant does so provide, is not a search five days after the issuance of the warrant illegal.

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Appellants

vs.

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Appeal from the District of Columbia Court of Appeals

JURISDICTIONAL STATEMENT

The appellants were charged by information in the District of Columbia Court of General Sessions with three (3) violations of the District of Columbia Alcoholic Beverage Control Act (title 25 section 109, District of Columbia Code, 1961 Edition). They were convicted by a jury and sentenced. A timely appeal was made to the District of Columbia Court of Appeals. The said District of Columbia Court of Appeals affirmed their convictions and by order of this Court (dated July 19, 1966) an allowance of appeal was granted. The jurisdiction of this honorable Court is invoked under title 11 section 733 District of Columbia Code, 1961 Edition.

STATEMENT OF THE CASE

The appellants, Alexander Underdown and William Laws, were charged in the District of Columbia Court of General Sessions in identical three count informations with offenses under Title 25, Section 109(a) of the District of Columbia Code. (District of Columbia Alcoholic Beverage Control Act) It was charged that on December 5, 1964, they had each illegally sold alcoholic beverages and kept the same for sale; and it was further charged that on December 19, 1964, they had illegelly kept alcoholic beverages for sale. The charges against them came about from the activities of an undercover policeman named Leonard B. Cousin, a member of the Gambling and Liquor Squad.

On December 14, 1964, Officer Cousin applied to the United States Commissioner for the District of Columbia for a search warrant for premises 652 Newton Street, N. W., Washington, D. C. In connection with his request, Officer Cousin presented an affidavit to the Commissioner in which he set forth certain facts and conclusions. The warrant was issued on the same day, (December 14, 1964).

The search warrant was executed by a group of police officers, including Officer Cousin, in the early morning hours on December 19, 1964. At the time of the execution of the warrant a number of bottles of alcoholic beverages were seized and the two appellants and several others were arrested in the premises. Four of those arrested, including the two appellants were charged, as indicted above, with various violations of the District of Columbia Alcoholic Beverage Control Act. A motion was filed for all defendants to suppress as evidence the articles that were seized by the police on December 19, 1964 under the warrant. A hearing on the motion was held before trial. At the conclusion thereof, the Court denied the same.

The charges against the four persons were consolidated and tried in the Court below before Judge George D. Neilson and a jury. At the trial Cousin was the principal government witness. During the trial, the defendants renewed their motion to the Court to suppress the evidence that was seized on December 19, 1964 The same was denied. In the trial, the jury convicted the appellants of the charges against them and the trial judge sentenced them upon this conviction as follows: Alexander Underdown, 90 days on each of the three counts to run consecutively; William Laws, $250.00 fine or 90 days on each of the three counts to run consecutively. An appeal was made to the District of Columbia Court of Appeals. The judgment of the trial Court was affirmed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTES INVOLVED

District of Columbia Code, 1961 Edition.

> "25-109. Sale without license prohibited—Exceptions.
>
> "(a) No individual, parternship, association, or corporation shall, within the District of Columbia, manufacture for sale, keep for sale, or sell any alcoholic beverage without having first obtained a license under this chapter for such manufacture or sale, except as provided in section 25-131.
>
> * * * *"

District of Columbia Code, 1961 Edition.

"25-129. Search warrants for illegal alcoholic beverages—Penalty for resisting officer—Disposition of illegal beverages—payment of bona fide liens.

"(a) A search warrant may be issued by any judge of the Municipal Court for the District of Columbia or by a United States commissioner for the District of Columbia when any alcoholic beverages are manufactured for sale, kept for sale, sold, or consumed in violation of the provisions of this chapter, and any such alcoholic beverages and any other property designed for use in connection with such unlawful manufacture for sale, keeping for sale, selling, or consumption may be seized thereunder, and shall be subject to such disposition as the Court may make thereof, and such alcoholic beverages may be taken on the warrant from any house or other place in which it is concealed.

"(b) A search warrant can not be issued but upon probable cause supported by affidavit particularly describing the property and the place to be searched.

"(c) The judge or commissioner must, before issuing the warrant, examine on oath the complaint and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

"(d) The affidavits or depositions must be set forth facts tending to establish the grounds of the application or probable cause for believing that they exist.

"(e) If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant signed by him with his name of office to the major and superintendent of police of the District of Columbia or any member of the Metropolitan police department, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits

have been taken in support thereof, and commanding him forthwith to search the place named for the property specified and to bring it before the judge or commissioner.

"(f) A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

* * * *

"(h) The judge or commissioner must insert a direction in the warrant that it be served in the daytime unless the affidavit is positive that the property is in the place to be searched in which case he must insert a direction that it be served at any time in the day or night.

"(i) A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void.

* * * *"

STATEMENT OF POINT

A search made pursuant to a warrant under title 25 section 129 District of Columbia Code, five days after issuance violates the requirement that it be executed "forthwith".

SUMMARY OF ARGUMENT

On December 14, 1964 Private Leonard B. Cousin, a Police Officer appeared before the United States Commissioner and requested a search warrant for premises 652 Newton Street, N. W. to seize alcoholic beverages that were sold or kept for sale on the premises in violation of the Alcoholic Beverage Control Act. A warrant was issued against the premises on that date. The warrant

was executed by a group of police officers five (5) days later on December 19, 1964. At that time alcoholic beverages were seized and the appellants were arrested and charged with violation of the said Alcoholic Beverage Control Act.

In this appeal the appellants contend that the execution of the warrant five (5) days after its issuance was void because the same was not executed "forthwith" as provided by the statute (title 25 section 129 (e) District of Columbia Code) under which it was issued. The language of the statute is explicit and unqualified. It is that a warrant issued under it must command the officer forthwith to search the place named. The warrant issued here contained such a command. Upon reason and authority the search that was made five (5) days after the issuance of the warrant was illegal.

ARGUMENT

A Search Made Pursuant to a Warrant Under Section 25-129 of the District of Columbia Code Five Days After Issuance Violates the Requirement That it be Executed "Forthwith".

On December 14, 1964 Private Leonard B. Cousin of the Morals Division, Metropolitan Police Department, appeared before the United States Commissioner for the District of Columbia and requested a search warrant for premises 652 Newton Place, N. W. for alleged violations of the Alcohol Beverage Control Laws of the District of Columbia. Private Cousin presented an affidavit to the Commissioner setting forth certain events that had occurred on December 5, 1964 and on December 13, 1964, during an investigation that Private Cousin was making about the premises.[1] On the basis of Private Cousin's

[1] The affidavit of Private Cousin is in the Joint Appendix at Page 3A.

affidavit the Commissioner issued a search warrant for 652 Newton Place, N. W.[2] This search warrant was executed on December 19, 1964 at 2:50 A.M.[3]

The affidavit of Leonard B. Cousin set forth that information had been received that alcoholic beverages were being sold in violation of the Alcohol Beverage Control Laws of the District of Columbia by two Negro males in premises 652 Newton Place, N. W., Washington, D. C. The affidavit further stated that on December 5, 1964, Cousin went to the premises and was admitted by the appellant Underdown and that while there he was served a meal and some scotch whiskey. Cousin said in the affidavit that while in the premises he saw about twenty other persons eating food and drinking alcoholic beverages. The affidavit went on to state that on Sunday, December 13, 1964 Cousin again went to the premises but that Underdown would not admit him saying that he was not a member of the club nor was he with a member of the club. Cousin also said in the affidavit that his investigation revealed that no license had been issued to the premises for the sale of alcoholic beverages and that he was positive that other alcoholic beverages were being concealed on the premises to be sold in violation of the Alcohol Beverage Control Laws of the District of Columbia.

The District of Columbia Alcohol Beverage Act is set forth in Title 25 of the District of Columbia Code, 1961 Edition. Section 109 of this Title makes it an offense for anyone to manufacture for sale, keep for sale, or sell any alcoholic beverages without having first obtained a license under this law except as otherwise provided. Private Cousin asserted in his affidavit that liquor was being

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[2] This search warrant is set forth in the Joint Appendix at Page 1A

[3] See "Return" made by Detective William H. Perkins, on the back of the search warrant, set forth in the Joint Appendix at Page 2A

sold and kept for sale at this premises in violation of this provision of the law.

Under Section 129 of Title 25 of the District of Columbia Code provisions are made for the application and issuance of search warrants when any alcoholic beverages are manufactured for sale, kept for sale, sold or consumed in violation of the provisions of the District of Columbia Alcohol Beverage Control Act. Subsection (e) thereof provides that if the person (Judge or Commissioner) to whom the application is made for the warrant is satisfied that the same should issue, he must issue a search warrant signed by him to the police department stating the grounds for its issuance, the names of the persons whose affidavits have been taken in support thereof, "and commanding him forthwith to search the place named for the property specified and to bring it before the Judge or Commissioner."

Section 129 further provides, at Subsection (i) thereof, that a search warrant must be executed and returned to the Judge or Commissioner who issued it within ten days after its date and that after the expiration of this time the warrant, unless executed, is void.

The sole question involved in this appeal is whether, under the circumstances of this case, the search warrant was executed "forthwith" in accordance with the provisions of Subsection (e) above.[4]

The language of Subsection (e) is quite explicit, it is that if a Judge or Commissioner determines that there is good ground for the same he must issue a search warrant signed by him to a member of the police department and commanding him forthwith to search the place named. In this regard, a warrant in this case was directed to the

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[4] See order of this Court signed July 19, 1966, which is set forth in the Joint Appendix at Page 23A

Chief of Police or any member of the police department and contained the following language:

> "YOU ARE HEREBY COMMANDED to search forthwith the place named and seize and take into your possession all alcoholic beverages and any other property designed for use in connection with such unlawful manufacture for sale, keeping for sale, or selling in violation of said Act, ..."

This warrant was issued to the police department on December 14, 1964. It was not served until December 19, 1964. A search made under a warrant five days after it is issued is not made "forthwith."

One of the earliest reported cases in which a similar question was considered was decided by the Supreme Judicial Court of Maine in the year 1897. This case, *State* v. *Guthrie*, 90 Me. 448, 38A, 368, is also the leading case on the question involved in this appeal. In the Guthrie case a warrant to search a building for intoxicating liquors was issued on July 20. This was the day that the complaint was made. On July 23, three days later, the warrant was executed by an officer. He seized some intoxicating liquors and arrested the respondent. Neither the warrant nor the law under which it was issued set forth when the warrant was to be executed but the statute did provide for the officer to "make immediate return of said warrant," and to have the respondent "forthwith" before the magistrate for trial.

In a well reasoned opinion that touched upon the history of the issuance of search warrants (which duly noted that it was a process unknown to the early common law), the Court in the Guthrie case ruled that a search warrant for intoxicating liquors must be served within a reasonable time after its issuance, or be abandoned. Significantly, the Court said that ministerial officers assuming to execute a statute or process upon the property or person of a citizen shall execute it promptly, fully, and

precisely; and that the time of execution is as essential as any other element. 38 A. 366. This proposition, among others, the Court said, was especially applicable to a search warrant, because by its nature it was a sharp and heavy police weapon to be used most carefully lest it wound the security or liberty of the citizen. The consideration most dominant to the Court was whether, under the circumstances of the case, the passage of time in executing the warrant was reasonable. The officers in the Guthrie case lived in the immediate neighborhood of the place to be searched. So there was no problem due to poor travel conditions and the like. In fact no reason was offered by the prosecution to explain the delay in executing the warrant. The Court therefore found that the unexplained delay of three days in serving the warrant was needless, unreasonable, and hence unlawful and destructive of the powers of the warrant. The conviction was reversed for this reason.

In the case of *People* v. *Wiedeman*, 324 Ill. 66, 154 N. E. 432 (Sup. Ct. Ill., 1926) a search warrant for intoxicating liquors was issued on April 6, 1926. The warrant was issued upon the complaint that the plaintiff in error possessed and sold intoxicating liquors in his home on certain dates immediately before the warrant was issued. The warrant was executed by the county sheriff on April 12, 1926. Several bottles of beer were seized and the plaintiff in error was arrested. He was convicted and on appeal he asserted that his motion to suppress the seizure on the grounds that authority to search and arrest under the warrant did not continue for six days and had expired.

The Court, in considering this contention noted the provisions of Section 6 of Article 2 of the state constitution, which is similar to the Fourth Amendment of the United States Constitution. The Court also noted the provisions of the Prohibition Act under which the warrant had been

issued. Remarkably, this statute is similar to the one in the instant case. It provided that,

> ". . . if the judge before whom complaint is made is satisfied that there is reasonable cause for believing that the person complained against is in illegal possession of intoxicating liquor, he shall issue a search warrant to the proper officer commanding him to forthwith enter the place described in the warrant, and, if he find and seize property described in the warrant, to forthwith bring the property seized and the person arrested before some judge having cognizance of the case."

The Court ruled that it was error for the beer that was seized to have been admitted in evidence at the trial below. The conviction was reversed, the Court saying in part:

> "The nature of the process and the command of the statute require that a search warrant must be executed with reasonable promptness, and not at the unlimited discretion of the officer. . . . Promptness in the service of the writ is not only necessary for the preservation of the liberty of the citizen, but also for the efficient administration of the law. Every hour's delay, whether caused by the officer's inefficiency or some other factor, endangers the success of the prosecution. If an officer may without excuse hold a search warrant for six days, he may hold it for six weeks or six months. The search warrant in this case was either valid when it was executed by the sheriff or it was void. There could be no middle ground. The warrant, not having been served within a reasonable time after it was issued, became functus officio, and the search made under it was one made without a warrant. . . ."

Two years later the Supreme Court of Illinois reaffirmed the doctrine of the Wiedeman case in its holding in the case of *People* v. *Petsko*, 332 Ill. 110, 163 N. E. 359 (1928). In the Petsko case the complaint for a

search warrant was filed and sworn to on August 28, 1927. The warrant was issued on that day. Search and seizure were made on September 7, ten days after the issuance of the search warrant. In following its earlier ruling of the Weidemen case, the Court again noted the provisions of the Prohibition Act, cited above, and went on to say as follows:

> . . . "The nature of a search warrant requires that when issued it shall be promptly executed. No discretion is conferred on the officer whose duty it is to serve the warrant to do so at his convenience. Unless a showing is made which reasonably accounts for the delay the warrant becomes functus officio and a search made under it is made without a warrant." . . .

In the case of *Mitchell* v. *United States*, 103 U. S. App. D. C. 341, 258 F. 2d 435 (1958), a search warrant, based upon alleged violations of narcotic laws, was issued on February 12, 1957. It was not executed until February 17, 1957. Drugs were seized from the defendant upon the execution of the warrant. In the course of the Court's opinion, it was noted that the delay in the execution of the warrant was not made the basis of an objection in the Court below and the appellant made no point of it on appeal. For this reason the entire panel hearing the case affirmed the conviction. Judge Bazelon of the panel in a separate concurring opinion went further in discussing the matter and expressed the view that a search warrant executed five days after its issuance is not executed "forthwith." The other two Judges sitting on the panel in a per curiam opinion reached an opposite conclusion based upon subsections (c) and (b) of Rule 41 of the Federal Rules of Criminal Procedure.

The appellants submit that the opinion of Judge Bazelon is decidedly more sound, better reasoned, and is the correct view of the matter. In his opinion, Judge Bazelon reviewed in detail most of the decided cases on the

subject. In his approach to the problem, Judge Bazelon first sets forth that a search warrant is based upon a judicial determination that the goods to be seized are presently at the place to be searched. If there is a delay in the execution of the warrant, the goods may disappear with the result that the goods seized came into existence after the warrant had been issued. It was further noted by Judge Bazelon that a five day delay in executing a warrant is against the command of the warrant and violates the statute under which it is issued. He says, and we agree, that the officer to whom the warrant is issued has no discretion, but must proceed with diligence at the earliest reasonable opportunity, to make the search as commanded.

The District of Columbia Court of Appeals, in meeting this contention of the appellants, said as follows:

> "Appellants further contend that the five-day delay in the execution of the warrant was unreasonable and that the evidence should have been suppressed on this ground. We note, however, that since an after-hours liquor establishment might operate only on weekend evenings, it was reasonable to wait until the following weekend to execute the warrant. Moreover, since Code 1961, Section 25-129(i) and the warrant itself provide that it must be executed within ten days, execution before the expiration of that time limit was seasonable. See *Mitchell* v. *United States*, 103 U.S. App. D.C. 341, 258 F.2d 435 (1958)." 217 A2d 659 at Page 662

This analysis is partially consonant with the views of the majority in the Mitchell case, supra. This conclusion, however, the appellants say is wrong. Subsection (i) of the statute does provide that a search warrant must be executed and returned "within ten days after its date; after the expiration of this time the warrant unless executed is void." The execution and the return must be completed within ten days. Earlier in the statute, at sub-

section (e), it provides that the warrant shall command the search forthwith. Subsection (i), therefore, controls the time that the return is to be made. If the search could be made up to ten days after it was issued, what, then would be the necessity to provide that it be made "forthwith." On the subject Judge Bazelon said in the Mitchell case:

> "Since the warrant in this case commanded the search to be made forthwith, only the return being permitted to be deferred for as much as ten days, the unexplained five-day delay of execution vitiated the warrant and made the search illegal. . . ."
>
> * * * *
>
> "To read the ten-day provision of subsection (i) as allowing an unexplained ten-day delay of execution of a search warrant is to read out of the statute completely the flat requirement that service be forthwith and all of the other foregoing indicia that Congress intended the speediest possible execution of search warrants. As I read the statute, ten days is the maximum allowable delay, even if circumstances make service impossible, but, if earlier service can be made, it must be made as soon as possible after the warrant has been issued. I think this is what the statute clearly and unambiguously directs. If there were any ambiguity resulting from the ten-day provision, I would resolve it in favor of the appellant. Such statutes 'are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied.' *Rea* v. *United States*, 1956, 350 U.S. 214, 218, 76 S.Ct. 292, 294, 100 L.Ed. 233. 'The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual.' *Sgro* v. *United States*, 1932, 287 U.S. 206, 210, 53 S.Ct. 138, 140, 77 L.Ed. 260."

This, the appellants submit, is the correct view. As one of its reasons for sustaining the five day delay in executing the warrant, the District of Columbia Court of Appeals said in this case that since it could be concluded that the appellants were operating an after hours establishment that might operate only on weekends, it was reasonable to hold a warrant that is issued on Tuesday until Sunday before executing it. Apparently, the Court sanctions the practice that permits the officer to delay executing the warrant if he does not feel that it can be successfully executed when received until such later time as he is sure that the goods are on the premises. This practice has always been condemned by the Courts. *State* v. *Miller*, 46 S. W. (2d) 541 (Sup. Ct. Mo., 1932) is a case in point. The defendant operated a restaurant with a private room in the rear. On April 28, 1930 an application was made by the prosecuting attorney for a search warrant against the defendant's premises. The warrant was issued that day. It could have been executed the same day; but it was not executed until May 10, 1930, twelve days later. The reason for the delay was given by the sheriff on a hearing upon a pre-trial motion to suppress. The warrant had been directed to the sheriff for service. He testified that when he received the warrant he also learned that the defendant knew about the warrant. The sheriff said that he was thus convinced that it would be useless to make a search at that time. He therefore concluded to wait until some later time when he thought there was some liquor in there. He said he used his judgment on it. On the evening of May 10, he said he saw a man who was pretty drunk going into the restaurant and later came out and from this he concluded that they were selling liquor that day. He entered the building and made a search under the warrant finding a small quantity of liquor in the rear room.

The defendant's pre-trial motion to suppress the evidence on the ground that there had been an unreasonable

delay in executing the warrant was denied in the lower Court. On appeal the Supreme Court of Missouri held that the search under these circumstances was illegal. The Court in its opinion discussed many of the cases dealing with the subject including *State* v. *Guthrie*, supra, and *People* v. *Wiedeman*, supra; and held that the intentional acts on the part of the sheriff in not executing the warrant condemned the search as invalid. In the instant case the premises to be searched was located within the city, therefore was freely accessible to the police. The warrant, by its provisions, could have been served in either the daytime or nighttime. The officers elected to hold it for five days before executing it. This was arbitrary and unreasonable.

CONCLUSION

The five day delay in executing the warrant in this case was contrary to the provisions of the law, inconsistent with the command of the warrant, unreasonable, unnecessary and hence the seizure thereunder should be suppressed.

Respectfully submitted

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing brief was served upon David Sutton, Esquire, Assistant Corporation Counsel, at his office at the District Building, 14th & E Streets, N. W., Washington, D. C., this ..... day of September, 1966. By mailing the same postage prepaid.

JOHN A. SHORTER, JR.

APPENDIX

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1 A

SEARCH WARRANT

THE UNITED STATES COMMISSIONER FOR THE DISTRICT OF COLUMBIA

Docket No. 15

Case No. 228

TO: Robert V. Murray, Chief of Police or Any member of the Metropolitan Police Department of the District of Columbia:

Affidavit having been made before me by Pvt. Leonard B. Cousin, Morals Division MPDC

that he (is positive) ([redacted] that on the premises known as

652 Newton Place N.W. (entire premises) Washington, D. C. (basement)

in the District of Columbia, alcoholic beverages are manufactured for sale, kept for sale, or sold in violation of the provisions of the District of Columbia Alcoholic Beverage Control Act, an Act of Congress approved January 24, 1934, (Title 25, D.C. Code, 1940 Ed.), and as I am satisfied that there is probable cause to believe that alcoholic beverages are manufactured for sale, kept for sale, or sold in violation of the provisions of said District of Columbia Alcoholic Beverage Control Act, on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

YOU ARE HEREBY COMMANDED to search forthwith the place named and seize and take into your possession all alcoholic beverages and any other property designed for use in connection with such unlawful manufacture for sale, keeping for sale, or selling in violation of said Act, serving this warrant and making the search ([redacted] (at any time in the day or night) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 14 day of December 19 64.

Sam Whittet

United States Commissioner,
for the District of Columbia.

(SEAL)

2 A

RETURN

I received the attached search warrant Dec. 19 1964, and have executed it as follows:

On Dec 19 1964, at 2 50 o'clock A M, I searched the premises described in the warrant and

I left a copy of the warrant with ALEXANDER H. Underdown

together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1 - BROWN Bag CONTAINING A Large QUANTITY of Number RUNDOWN TAPES + RELATED GAMBLING PARAPHERNALIA
+$296.24 IN BILLS + CHANGE.
1 - NOTE BOOK CONTAINING NAMES ETC about CLUB
1 QUART of OLD CHARTER FULL
1 QUART of JOHNNIE WALKER FULL
1 4/5 QUART DUFF Gordon SHERRY FULL
1 25/32 QUART HARVEY'S CREAM FULL
13 BOTTLES containing ASSORTED whiskey PART FULL
7 Decks of USED CARDS
16 ~~Cans of Beer~~

This inventory was made in the presence of Sgt. R.G KISSNER
Sgt. J. PALMISANO and A. H. Underdown

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

Det. William L. Perkins
Member, Metropolitan Police Dept.

Subscribed and sworn to and returned before me this ___ day of _____ 19___

United States Commissioner,
for the District of Columbia.

Statement of facts relative to the request for a U.S. Commissioner's Search Warrant for the premises 652 Newton Pl. N.W., (Entire Premises) Washington, D.C. for violations of the A.B.C. Laws of the District of Columbia.

Having received information that alcoholic beverages were being sold in violation of the A.B.C. Laws of the District of Columbia by two Negro males in the premises 652 Newton Pl. N.W., Washington, D.C., Officer Leonard B. Cousin, Morals Division, Gambling & Liquor Squad, M.P.D.C. was assigned to make an investigation.

At about 2:20 A.M., on Saturday, December 5, 1964, I went to the premises 652 Newton Pl. N.W., Washington, D.C. and was admitted to the bsmt. of these premises by a Negro male known to me as Alexander Underdown. About 50 yrs., about 6'2" tall, about 210 lbs., light complexion. After I hung my top-coat on a coat-rack, I then took a seat at a table with a Negro female and a Negro couple. Alexander Underdown then asked, "What do you want?" I told him that I wanted two shots of scotch, one ham and egg breakfast for myself and one chitterling dinner for a Negro female that was seated at the table with me. Alexander Underdown then returned shortly afterward with the above mentioned two shots of scotch put same on the table, left and returned moments later with the ham and egg breakfast and the chitterling dinner that I mentioned above, which I ordered from him. After I ate what I purchased (Ham and egg) and the Negro female ate the Chitterling dinner, I then poured the above mentioned scotch that I purchased in these premises into a glass jar, put same into my pocket and asked Alexander Underdown, How much do I owe you? He replied by saying, "Go up to the bar, the bartender has your bill." I then went to the bar and asked the bartender, (Negro male, about 33-38 yrs., about 5'8" tall, medium complex-

ion) How much do I owe you? The bartender replied, "$8.00." I then paid the bartender with $8.00 of advanced M.P.D.C. funds, got my coat from the coat-rack, observed about 20 Negro males and Negro females eating and consuming alcoholic beverages and departed these premises at 2:50 A.M. on the above mentioned date with the scotch mentioned above that I purchased in these premises.

At about 12:40 A.M., on Sunday, December 13, 1964, I again went to these premises (652 Newton Pl. N.W., Washington, D.C.) and the door was answered by a Negro male, about 5'6" tall, about 150 lbs., about 45 yrs., light complexion. This described male then let two unidentified Negro females into these premises, stopped me at the door and said, "I don't know you mister, I can't let you in." I then asked this described male to call Underdown (First name is Alexander and the same Alexander Underdown described and mentioned several times in above paragraph) The described male then went and got Alexander Underdown who told me that I could not come in because I am not a member of the club. I then told him that I was in Saturday (Dec. 5, 1964) with a member of the club, I can't see why he could not let me in at this time. He replied, "I am sorry mister, I can't let you in because you are not a member of the club or you are not with a member of the club. I then departed the entrance to these premises and departed the area.

Investigation revealed that no license has been issued to these premises for the sale of alcoholic beverages. Investigation revealed also, that these premises have been raided previously for A.B.C. violations.

I am positive that other alcoholic beverages are being concealed on these premises to be sold in violation of the A.B.C. Laws of the District of Columbia.

/s/ Pvt. Leonard B. Cousin
PVT. LEONARD B. COUSIN, Morals Division.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 14th DAY OF DECEMBER, 1964.

/s/ Sam Wertleb
SAM WERTLEB,
U.S. Commissioner for the District of Columbia.

Form AO 104

UNITED STATES COMMISSIONER

_____ DISTRICT OF Columbia

FILED

Dec 23 8 12 AM '64

RECORD OF PROCEEDINGS—MISCELLANEOUS

BEFORE SAM WERTLEB (Name of Commissioner), U. S. Court House, Wash. 1, D. C. (Address)

This form should be used to record proceedings for which Forms AO 100 and AO 101 are not adapted, such as applicatio for search warrants, extradition proceedings, depositions in civil cases, proceedings for the release of poor convicts, referenc civil or admiralty cases, attachments and subsequent hearings in internal revenue matters, proceedings to settle or certi unpayment of seamen's wages, civil rights proceedings, detentions of witnesses on removal proceedings in connection wi riminal proceedings, if not included in Form AO 100, etc. A separate page should be used for each proceeding, showing t tle of the case, its nature, and the date and nature of each step taken.

Commissioner's Docket No. 15, Case No. 228

Search

vs.

1652 Newton Place N.W. (entire premises basement) Washington, D. C. Occupied by John Doe

Violation

District of Columbia Alcoholic Beverage Control Act (Nature of proceeding)

DATE 1964	
Dec. 14	Search Warrant issued to Chief of Police or any member of MPDC upon formal written application (affidavits) of Pvt. Leonard B. Cousin, Morals Division MPDC
Dec. 22	Search Warrant returned by Det. William M. Perkins, Morals Division MPDC
	Seizure on return attached hereto - executed by search of premises on December 19, 1964 at 2:50 a.m.
	Papers sent to District of Columbia Court of General Sessions

DATE	

ified to be a correct transcript of Docket Entries.
D December 22, 1961

Sam Wm Smith
United States Commissioner

District of Columbia Court of General Sessions

CRIMINAL DIVISION OCTOBER TERM, A. D. 1964

THE DISTRICT OF COLUMBIA, ss:

CHESTER H. GRAY, Esq., Corporation Counsel, by _____, Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that _____ Alexander H. Underdown late of the District of Columbia aforesaid on or about the 5th day of [illegible] in the [illegible] and [illegible] in the District of Columbia, aforesaid, and on 652 Newton Place Street, Avenue, north, south, west, east, did then and there ~~sell~~ keep for sale certain alcoholic beverage, to wit, whiskey, ~~wine and beer~~ without first having obtained a licenes so to do

SECOND COUNT

The aforesaid Alexander H. Underdown on or about the 5th day of [illegible], 1964, at the place aforesaid, did then and there sell ~~keep for sale~~ certain alcoholic beverage to wit, whiskey, ~~wine and beer,~~ without first having obtained a license so to do.

THIRD COUNT

The aforesaid Alexander H. Underdown on or about the 19th day _____, 1964, at the place aforesaid, did then and there ~~sell~~ keep for sale certain alcoholic beverage to wit, whiskey, wine and beer, without first having obtained a license so to do.

FOURTH COUNT

The aforesaid _____ on or about the _____ day _____, 1964, at the place aforesaid, did then and there sell keep for sale certain alcoholic beverage to wit, whiskey, wine and beer, without first having obtained a license so to do.

FIFTH COUNT

The aforesaid _____ on or about the _____ day _____, 1964, at the place aforesaid, did then and there sell keep for sale certain alcoholic beverage to wit, whiskey, wine and beer, without first having obtained a license so to do.

SIXTH COUNT

The aforesaid _____ on or about the _____ day _____, 1964, at the place aforesaid, did then and there sell keep for sale certain alcoholic beverage to wit, whiskey, wine and beer, without first having obtained a license so to do.

did then and there knowingly sell denatured alcohol for beverage purposes and under circumstances from which he might reasonably deduct the intention of the purchaser to use the same for beverage purposes.

contrary to and in violation of an Act of Congress, the A. B. C. Law of the District of Columbia, and constituting a law of said District.

CHESTER H. GRAY,
Corporation Counsel

Personally appeared R. J. McKernan this 21st day of [illegible], A. D. 1964, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

_____
Assistant Corporation Counsel for the District of Columbia

WARRANT

No. ....

DISTRICT OF COLUMBIA, ss:

To the Chief of Police of the District of Columbia, Greetings:

Whereas, it appears by oath of

....

that ....

committed the offense as charged on the reverse side hereof,

YOU ARE THEREFORE HEREBY COMMANDED to take the said

....

and bring him/her before the said COURT of GENERAL SESSIONS forthwith to answer said charges.

Witness the Honorable JOHN LEWIS SMITH, JR., Chief Judge of the District of Columbia Court of General Sessions, and the seal of said Court this .... day of .... A.D. 1964

WALTER F. BRAMHALL
Clerk, Court of General Sessions

....
Deputy Clerk

LET THIS WARRANT ISSUE

....
Judge, Court of General Sessions

OFFICER MUST EXECUTE CEPI

Cepi:
- Amount Collateral Posted $ ....
- Date Collateral Posted ....
- Precinct Collateral Posted ....
- Remarks ....

OFFICER'S NAME ....

Bond $500 JWC 3-22 DC 33873-'64

Col. .... No. ....

At No. .... Precinct Date ....

INFORMATION

DISTRICT OF COLUMBIA

vs.

Alexander H. Underdown

Address ....

Age 51 Color c

Atty J. Shorter

VIOLATIONS OF A. B. C. LIQUOR LAW

DC 33873-64

WITNESSES

R. J. McKernan
Officer
J. W. Palmisano
J. B. Cousin

DEC 21 1964

CONTINUED TO 1-19-65

Request of ( ) Gov't (✓) Def't

BOND set at $ ....

NOTE: ....

JAN 19 1965

2/19/65

500.

FEB 17 1965

C 2/24/65

for hearing of Motion.

FEB 17 1965

C3-3-65

FEB 17 1965

C 2/25/65

for hearing of Motion, and

3/3/65 for jury trial

2-12-65

2-17-65

MAR 3 1965

C 4-8-65 with jury. Bond to remain

MAR 3 1965

Defts' motion to suppress

JAN 19 1965

2/19/65

500.

FEB 17

C 2/24/

for hearing

Motion.

FEB 17 1965

C3-3-65

2-12-65

FEB 17 1965

C 2/25/6

for hearing

3/3/65

for jury trial.

MAR 3

C 4-8-65 with jury.

BC-33873-64 DISTRICT OF COLUMBIA vs. ALEXANDER H. UNDERDOWN

APR 8 1965
Jury impanelled and sworn. Trial commenced & heard in part. Respited until Apr. 9, 1965 at 11:00. (Kaniczko rep.)

APR 9 1965
Trial resumed and completed. Case to jury. Deliberations commenced & respited until Apr. 12, 1965.

APR 12 1965
Deliberations resumed and completed. Jury Verdict Guilty as to counts 1 & 2. Jury Verdict Not Guilty as to count #3. Contd 4-23-65 for Sent.

APR 23 1965
— 90 days on each count to run consecutive. Appeal bond $500.00

John W. Carter, Surety.

APR 23 1965

May 3, 1965 - Notice of Appeal Filed.

District of Columbia Court of General Sessions

CRIMINAL DIVISION

OCTOBER TERM, A. D. 1964

THE DISTRICT OF COLUMBIA, ss:

CHESTER H. GRAY, Esq., Corporation Counsel, by _____, Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that _____

William V. Lowe

late of the District of Columbia aforesaid on or about the 5th day of OCTOBER in the year A.D. nineteen hundred and sixty-four, in the District of Columbia, aforesaid, and on 652 Newton Place Street, Avenue, north, south, west, east did then and there ~~sell~~ keep for sale certain alcoholic beverage, to wit, whiskey, ~~wine and beer~~ without first having obtained a licenes so to do

SECOND COUNT

The aforesaid William V. Lowe on or about the 5th day of October, 1964, at the place aforesaid, did then and there sell ~~keep for sale~~ certain alcoholic beverage to wit, whiskey, ~~wine and beer~~, without first having obtained a license so to do.

THIRD COUNT

The aforesaid William V. Lowe on or about the 19th day October, 1964, at the place aforesaid, did then and there ~~sell~~ keep for sale certain alcoholic beverage to wit, whiskey, wine and beer, without first having obtained a license so to do.

FOURTH COUNT

The aforesaid _____ on or about the _____ day _____, 1964, at the place aforesaid, did then and there sell keep for sale certain alcoholic beverage to wit, whiskey, wine and beer, without first having obtained a license so to do.

FIFTH COUNT

The aforesaid _____ on or about the _____ day _____, 1964, at the place aforesaid, did then and there sell keep for sale certain alcoholic beverage to wit, whiskey, wine and beer, without first having obtained a license so to do.

SIXTH COUNT

The aforesaid _____ on or about the _____ day _____, 1964, at the place aforesaid, did then and there sell keep for sale certain alcoholic beverage to wit, whiskey, wine and beer, without first having obtained a license so to do.

did then and there knowingly sell denatured alcohol for beverage purposes and under circumstances from which he might reasonably deduct the intention of the purchaser to use the same for beverage purposes.

contrary to and in violation of an Act of Congress, the A. B. C. Law of the District of Columbia, and constituting a law of said District.

CHESTER H. GRAY,
Corporation Counsel

Personally appeared R. J. McLernon this 21st day of October, A. D. 1964, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

_____
Assistant Corporation Counsel for the District of Columbia

WARRANT

No. ____________

DISTRICT OF COLUMBIA, ss:

To the Chief of Police of the District of Columbia, Greetings:

Whereas, it appears by oath of

____

that ____________

committed the offense as charged on the reverse side hereof,

YOU ARE THEREFORE HEREBY COMMANDED to take the said

____

and bring him/her before the said COURT of GENERAL SESSIONS forthwith to answer said charges.

Witness the Honorable JOHN LEWIS SMITH, JR., Chief Judge of the District of Columbia Court of General Sessions, and the seal of said Court this ____________ day of ____________ A.D. 1964

WALTER F. BRAMHALL
Clerk, Court of General Sessions

____________ Deputy Clerk

LET THIS WARRANT ISSUE

____

Judge, Court of General Sessions

OFFICER MUST EXECUTE CEPI

Cepi:
- Amount Collateral Posted $ ____________
- Date Collateral Posted ____________
- Precinct Collateral Posted ____________
- Remarks ____________

OFFICER'S NAME ____________

BOND

(33)

Col. ____________ No. DC 38874-64

At No. ____ Precinct Date ____________

INFORMATION

DISTRICT OF COLUMBIA

vs.

William V. Laws

Address ____________

Age ____ Color ____

Atty: J. Shorter, Ret'd

Reported by Miss Cutrona

DEC 8 1964

38874-64

VIOLATIONS OF A. B. C. LIQUOR LAW

Atty Roy Ellis

WITNESSES

R. J. McKernan Officer

J. M. Palmisano

J. B. Cousin

DEC 21 1964

CL-19-65 $300

CR 25 1131-64

Committed

OCC — A

JAN 19 1965

Plea Not Guilty, Jury Trial Demanded.
Cont'd _____ Bond $_____

Cont 2/19/65
J. W Carter Judge

2-12-65 Motions
for Judgment Rec'd
filed. Hrg Date
set for 2-17-65:
RD

FEB 17 1965

C: 2/24/65
for hearing of
Motion
and
3/3/65 - J
for Jury
Trial

MAR 3 1965

Dfts' motion to suppr.
Denied.

3/3/65

MAR 3 1965

C 4-8-65
with jury
Bond to remain
as Lw

JAN 19 1965

Plea Not Guilty, Jury Trial Demanded.
Cont'd _____ Bond $_____

Cont 2/19/65
J. W Carter Judge

2-12-65 Motions
for Withdrawal Req't
filed. Hrs Date
set for 2-17-65:
RLD

FEB 17

C. 2/24,
for hearing
Motion
and
3/3/65 - J
for Jury
Trial

MAR 3 1965

Dfts' motion

Denied,

MAR 3 1965

C. 4-5-65
...ued
J. ...

DC-3387h-64 WILLIAM V. LAWS vs. DISTRICT OF COLUMBIA

APR. 8 1965
Jury empanelled and sworn. Trial commenced & heard in part. Resumed until Apr. 9, 1965 at 11:00. (Jamieson Rep.)

APR 9 1965
Trial resumed and completed. Case to jury - Deliberation commenced & resumed until Apr. 12, 1965.

APR 12 1965
Deliberations resumed & concluded
Jury Verdict Guilty as to Counts 1 & 2
Jury Verdict Not Guilty as to Count #3.
Cntd 4-23-65 for sentence.

APR 23 1965
$250 or 90 days on each count consecutive.
Appeal Bond $300.00

APR 23 1965
John W. Carter, Surety

May 3, 1965
Notice of Appeal Filed.

DISTRICT OF COLUMBIA
COURT OF GENERAL SESSIONS

CRIMINAL DIVISION

Criminal No. DC 33873-65

Filed, Feb. 12, 3:10 P.M., '65
Walter F. Bramhall, Clerk of District of Columbia
Court of General Sessions

DISTRICT OF COLUMBIA

vs.

ALEXANDER UNDERDOWN, ADOLPHUS WIGGINS, WILLIAM LAWS AND JOHNNY WILLIAMS

MOTION TO SUPPRESS

Comes now the defendants Alexander H. Underdown, Adolphus Wiggins, William Laws and Johnny Williams and move this Honorable Court to suppress as evidence in this cause certain objects that were seized by officers of the Metropolitan Police Department from premises 652 Newton Place, N. W., on December 19, 1964. As reasons therefor, the defendants state as follows:

1. That on or about December 19, 1964, members of the Metropolitan Police Department entered premises 652 Newton Place, N. W. and conducted a search thereof, and seized certain objects and a quantity of liquor. That the said entry was under color of a search warrant that had been issued by the United States Commissioner on December 19, 1964.

2. That the said entry, search, seizure were against the will of the defendants and the same were in violation of the rights of the defendants under the Fourth Amendment of the United States Constitution and illegal. The said search warrant was improvidently issued upon inadequate probable cause.

/s/ John A. Shorter, Jr.
JOHN A. SHORTER, JR.
Attorney for Defendants
508 Fifth Street, N. W.
Washington, D.C.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 3793

ALEXANDER H. UNDERDOWN, APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

No. 3794

WILLIAM V. LAWS, APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

Appeals from the District of Columbia
Court of General Sessions

(Argued January 24, 1966 Decided March 24, 1966)

John A. Shorter, Jr., for appellants.

David P. Sutton, Assistant Corporation Counsel, with whom *Chester H. Gray*, Corporation Counsel, *Milton D. Korman*, Principal Assistant Corporation Counsel, and *Hubert B. Pair*, Assistant Corporation Counsel, were on the brief, for appellee.

Before HOOD, Chief Judge, and QUINN and MYERS, Associate Judges.

QUINN, *Associate Judge:* Appellants were convicted of keeping alcoholic beverages for sale and of selling the same without a license in violation of Code 1961, § 25-109 (a). A motion to suppress evidence was made before and during trial, but was denied in both instances. Appellants allege error in the denial of their motion, contending that the evidence used against them was obtained as the result of an illegal search and seizure.

The search of the premises in question was made at 2:50 A.M. on the morning of December 19, 1964, pursuant to a search warrant which authorized the police to make the search at any time of the day or night. The warrant was issued on the basis of an affidavit of a police officer, assigned to the Morals Division, who swore he was positive alcoholic beverages were being concealed there to be sold in violation of the law. This averment was necessary because the Alcoholic Beverage Control Act, Code 1961, § 25-129(h), prohibits the serving of a warrant at night "unless the affidavit is positive that the property is in the place to be searched." Appellants contend that the facts presented in the affidavit were insufficient to establish the positiveness required for a night warrant.

The affidavit set forth that the police officer went to the premises in question at about 2:20 A.M. on Saturday, December 5, 1964, and that he was seated at a table with a female companion and another couple. Appellant Underdown asked for his order and the officer requested two shots of scotch and meals for himself and his companion. Underdown brought the food and drink to the table and told the officer that the bartender had his bill. After he had finished eating the officer went to the bar and paid eight dollars. Upon leaving the officer observed about twenty persons eating and consuming alcoholic beverages.

The affidavit further recited that the officer returned to the premises at about 12:40 A.M. on Sunday, December 13, 1964, but was refused admittance. Appellant Underdown came to the door and told him that he could not enter because he was not a member of the club and was not in the company of a member. The officer then left.

On the following day the officer requested the warrant, stating that investigation revealed that no license had been issued for the sale of alcoholic beverages at these premises and that he was positive that alcoholic beverages

were there for the purpose of illegal sale. The warrant was issued on December 14 and executed on December 19.

It is appellants' contention that since nine days had elapsed between the purchase of drinks on the premises and the application for the warrant, the officer could no longer be positive that alcoholic beverages were still there for the purpose of sale. Without such positive knowledge, they assert, the probable cause for the issuance of a night warrant was lacking and the resulting search was illegal.

A similar argument was made in *Williams* v. *District of Columbia*, D.C.Mun.App., 167 A.2d 893 (1961), where we said that the test of whether too long a period of time had passed between the commission of unlawful acts and the issuance of a warrant is one of reasonableness, although a less flexible standard is applied when the warrant is one that must be based on "positive" knowledge. There we held that a lapse of four days was not unreasonable, stating that:

> "* * * It would be * * * reasonable to conclude in the instant case that the club was still in operation four days after the initial inspection, and even if the liquor there on June 21 were consumed that the stock would have been replenished. In other words, affiant's positive knowledge goes to the operation of an 'after-hours' club dispensing liquors, and not necessarily to any specific kind or amount of liquor." (167 A.2d at 895-6.)

Where alcoholic beverages are purchased in circumstances indicating a continuing business in the sale of illicit liquor, there is a strong presumption that the liquor will be found on the premises for a reasonable time thereafter. *Williams* v. *District of Columbia, supra; Murby* v. *United States*, 2 F.2d 56 (1st Cir. 1924); *People* v. *Montgomery*, 27 Ill.2d 404, 189 N.E.2d 327 (1963); *State* v. *Cooper*, 9 N.J.Misc. 342, 154 A. 423 (1931); *State* v. *Best*, 8 N.J.Misc. 271, 150 A. 44 (1930); *Syrakas* v. *State*, 227 Wis. 59, 277 N.W. 621 (1938). Here the police

officer described the premises as having a bar and a bartender, tables enough for at least twenty persons, and food and beverage service. Moreover, when he returned the following weekend he was informed that the "club" was still in operation. These facts were sufficiently persuasive for the formulation of his "positive" belief that the business was continuing and that alcoholic beverages were still on the premises nine days after he had made the purchase and one day after he was refused admittance.

"Appellants further contend that the five-day delay in the execution of the warrant was unreasonable and that the evidence should have been suppressed on this ground. We note, however, that since an after-hours liquor establishment might operate only on weekend evenings, it was reasonable to wait until the following weekend to execute the warrant. Moreover, since Code 1961, § 25-129 (i) and the warrant itself provide that it must be executed within ten days, execution before the expiration of that time limit was seasonable. See *Mitchell* v. *United States*, 103 U.S.App.D.C. 341, 258 F.2d 435 (1958)."

Appellants raise other points in their assignment of errors, but as no argument was presented on them, they are considered waived. In any event, the errors alleged were nonprejudicial.

Affirmed.

upon inadequate probable cause" (J. A. 18). However, the record fails to reveal that appellants raised any question in the Court of General Sessions respecting the seasonable execution of the search warrant. And, as previously noted, their failure to raise the question precluded the Government from showing the reason or reasons for the intervention of the five-day period preceding the execution of the warrant. Accordingly, the question of the seasonable execution should not be considered by this Court. What Judge Bazelon said in his concurring opinion in Mitchell v. United States, 103 U. S. App. D. C. 341, 258 F. 2d 435, 436 (1958), is apposite here:

> "On the motion to suppress the evidence, appellant attacked the sufficiency of the affidavit upon which the search warrant had been issued, but did not object to the warrant on the ground of unseasonable execution. That objection is therefore not available to him on appeal." [Footnote omitted.]

Moreover, error which emanates from the admission into evidence of the fruits of an unlawful search is not reversible error unless prejudice to the defendant is shown. See Woods v. United States, 99 U. S. App. D. C. 351, 354, 240 F. 2d 37, 40 (1956); United States v. McCall, 291 F. 2d 859 (2nd Cir., 1961). In the instant case, the admission into evidence of the liquor seized on December 19, 1965, clearly did not prejudice appellants, for each was acquitted of the charge of unlawfully keeping liquor for sale without a license on the date of the search and seizure (R. 60, 75).

Accordingly, under no theory can the admission into evidence of the seized liquor be held to constitute reversible error.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the decision of the District of Columbia Court of Appeals affirming appellants' judgments of conviction is in all respects correct and should be affirmed.

MILTON D. KORMAN,
Acting Corporation Counsel, D.C.

HUBERT B. PAIR,
Acting Principal Assistant
Corporation Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation Counsel, D.C.

DAVID P. SUTTON,
Assistant Corporation Counsel, D.C.

Attorneys for Appellee,
District Building,
Washington, D. C. 20004

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Moreover, error which emanates from the admission into evidence of the fruits of an unlawful search is not reversible error unless prejudice to the defendant is shown. See Woods v. United States, 99 U. S. App. D. C. 351, 354, 240 F. 2d 37, 40 (1956); United States v. McCall, 291 F. 2d 859 (2nd Cir., 1961). In the instant case, the admission into evidence of the liquor seized on December 19, 1965, clearly did not prejudice appellants, for each was acquitted of the charge of unlawfully keeping liquor for sale without a license on the date of the search and seizure (R. 60, 75).

said in Lewinsohn v. United States, 278 Fed. 421, 425 (7th Cir., 1922):

> "* * * There could be however, an almost irrefutable conclusion drawn from a single sale, provided the facts surrounding such sale warranted the inference that it was one of the ordinary and usual incidents of the business there conducted. To illustrate: Assume A., B., and C. as strangers enter a room, having the appearance and equipment of a saloon, and well occupied by customers, and approach the bar and, openly and in such a tone as to be heard by all, ask the price of a drink of whisky, are informed that it is 75 cents a drink, and thereupon pay the money. The whisky is poured out and there drunk, all in plain sight of those present. Could there be any question that such evidence would support a finding that the premises were being used as a common nuisance within the definition of section 21 of the act? In fact, such evidence might be much more persuasive and conclusive than several gifts or sales of liquor made secretly and by one other than the proprietor * * *."

Clearly, therefore, in view of cogent facts here depicting a continuing unlawful liquor business, the search warrant was executed "forthwith" within the meaning of the statute.

II

The proceedings in the Court of General Sessions involved no error affecting appellants' substantial rights.

In their motion to suppress filed in the Court of General Sessions, appellants asserted that the "search warrant was improvidently issued

See also United States v. Old Dominion Warehouse, 10 F. 2d 736 (2d Cir., 1926), and cf. Dixon v. United States, 211 F. 2d 547 (5th Cir., 1954).

In the instant case, the affidavit on which the search warrant issued discloses that, nine days[4] prior to issuance of the warrant, a policeman was admitted to an unlicensed after-hours "club" located in the basement of 652 Newton Place, Northwest, and that while there he purchased alcoholic beverages. The affidavit discloses further that the "club" was equipped with tables and a bar attended by a "bartender" and that about twenty individuals were observed "consuming alcoholic beverages." Moreover, when the officer returned the following weekend, he was informed that the "club" was still in operation (J. A. 3-5). Appellee submits that far from disclosing merely a "one-shot" violation of law, such circumstances depict a continuing business in the illegal sale of liquor. As the court

---

[4] A total of fourteen days, therefore, elapsed between the illegal liquor sale and the execution of the warrant. Even if the police officer had permitted such a period of time to intervene before making application for the warrant, it is extremely doubtful that its intervention would have destroyed the "probable cause" required for issuance of the warrant. See the recent annotation "Search Warrant--Affidavit--Sufficiency," 100 ALR 2d at 534, et seq.; and see Nuckols v. United States, 69 U. S. App. D. C. 120, 99 F. 2d 353 (1938), which involved the intervention of periods of 11 and 19 days respectively.

> search, the entry was unlawful. We all know, however, that purveyors of liquor replenish their stocks, and it was a fair inference that whoever was maintaining this saloon, would do the same, and that there would be whisky on the premises on December thirteenth, as there had been on November twenty-fourth, though not the same. * * * "

And in State v. Best, 8 N. J. Mis. R. 271, 150 Atl. 44 (1930), the illegal sale of liquor occurred thirteen days before issuance of the search warrant and an additional seven days elapsed before its execution. Concluding that there had been no unreasonable delay requiring the quashing of the warrant, the court said (150 A. 46):

> " * * * The affidavit indicates that the premises in which the liquor was purchased was fitted up in a rather permanent fashion for the sale of liquor, for it contained a bar and back bar, and purchases were rung up on a cash register. In addition, there were tables, chairs, and a gambling machine. The affiants observed men apparently under the influence of liquor in the premises. Liquor was purchased on two occasions. When such proofs as these are shown, the legal presumption is that the condition indicated continued to exist for a reasonable time thereafter, nothing to the contrary appearing. From the last purchase referred to in the affidavits, until the date of the issuance of the warrant, thirteen days elapsed, and, up to the time of the execution of the warrant, twenty days elapsed. I am constrained to hold that under the circumstances the intervening time was not unreasonable * * * ."

of the search warrant. Indeed, it would appear that, for the purpose of determining whether the search warrant was executed within a reasonable time, cases involving establishments which are permanently fitted up for the illegal sale of liquor are in a class by themselves and, as such, should be distinguished from cases in which the object of the search is, for example, a small package of narcotics or item of like size which may quickly and ~~conviently~~ conveniently be removed to another place.

In United States v. Fitzmaurice, 45 F. 2d 133 (2nd Cir., 1930), the affidavit on which the warrant issued disclosed that guests were "ordering, drinking, and paying for whiskey which was being openly sold" in defendant's "saloon." Although 10 days intervened between the undercover agent's observation of such activity and the issuance of the search warrant, and an additional nine-day delay occurred previous to the execution of the warrant, the Court nonetheless concluded that there was "reasonable ground" for the belief that "there was still whiskey to be seized at the time of the raid." The court said (45 F. 2d at 34):

> " * * * We agree that the whisky originally on hand had probably been drunk; if the property to be seized, which the warrant is to 'specify' (sections 616, 626, title 18, U.S. Code [18 USCA §§ 616, 626]), must be the identical liquor possessed at the time of the

Appellee submits that a consideration of the factual background of the instant case in the light of settled legal principles will compel the conclusion that the search warrant in question was executed with reasonable promptness and hence "forthwith."

Cornelius, in § 230 of his oft-cited treatise, Search and Seizure, supra, makes plain that the reason for the rule requiring execution of search warrants with reasonable promptness is that " * * * search warrant proceedings * * * are directed to existing violations of the law and not contemplated violations * * * . " In this connection the author notes that in all our large centers of population the occupants of premises are constantly shifting about, and that "certain property might today be occupied by a violator of the law and tomorrow by an entirely innocent party." (ib. at p. 539.)

In his concurring opinion in Mitchell v. United States, supra, Judge Bazelon expresses a similar rationale with which appellants apparently agree (258 F. 2d at 437; brief, p. 13). Consistent with such rationale, courts have considered the likelihood of a continuing business in the illicit sale of liquor a significant factor bearing on the question of reasonable promptness and, under such circumstances, have concluded that time lapses of even greater duration than that in question have not militated against the seasonable execution

B

If the statute in question is given a construction contrary to that urged by appellee, it by no means follows that the search warrant was not executed "forthwith." Courts which have interpreted this term in cases wherein the applicable statute failed to require execution of the search warrant within a definite number of days have held with consistency that a search warrant is executed "forthwith" when it is executed within a "reasonable time." See State v. Guthrie, 90 Me. 448, 38 Atl. 368 (1897); State v. Miller, 329 Mo. 855, 46 S. W. 2d 541 (1932); State v. Melanakis, 129 W. Va. 317, 40 S. E. 2d 314 (1946); Joyner v. City of Lakeland, 90 So. 2d 118 (Fla. Sup. Ct., 1956). A concise pronouncement of this proposition appears in State v. Melanakis, supra, wherein the court said (40 S. E. 2d at 318):

> "* * * The admission of facts discovered and testimony procured in that manner is seriously questioned due to the fact of nine days delay, the rule being that an unexecuted search warrant becomes stale after the lapse of a reasonable time after its issuance. * * * The mandate of the warrant is that it be executed 'forthwith' and the cases seem agreed that an absolute compliance with that command is unnecessary, that a substantial compliance suffices, and that what is reasonable under the circumstances of each case determines the question of compliance." [Citations omitted; emphasis added.]

execution of the warrant, the court said:

> " * * * The requirement for promptness in the execution of this kind of process is recognized in a number of states by statutes designating the time within which search warrants must be executed; the time so fixed, as a general rule, being very brief. The 'Volstead Act'[3](U. S. Comp. St. § 10138 1/4 et seq.), requires that a search warrant issued under federal authority must state on its face that it is to be executed and returned within ten days. * * * " [Emphasis added.]

And cf. State v. Miller, 329 Mo. 855, 46 S. W. 2d 541 (1932).

Moreover, the courts deciding such cases were not required to consider the effect of statutory construction which had been in existence for almost half a century with the obvious approval of the legislature. Accordingly, we are led to the irresistible conclusion that the rule enunciated by the majority opinion of this Court in Mitchell v. United States, supra, is eminently sound and should control the instant appeal.

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3 The applicable search and seizure provisions of the Volstead Act were taken from the Espionage Act of 1917 (See 41 Stat. 308). As previously pointed out, the origin of the statutory provisions here involved may also be readily traced to the Espionage Act.

although such language has been the subject of renewed legislative consideration, it has been permitted to stand unrevised. Clearly, therefore, the ten-day requirement as to execution of search warrants must be here given the meaning constantly ascribed to it by the courts with legislative approval.

Appellee is not unmindful of those cases relied on by appellants (brief, pp. 9-16) and cited in the concurring opinion in Mitchell v. United States, supra, in which Judge Bazelon expressed the view that an unexplained[2] five-day delay in execution of a search warrant vitiated such warrant (See 258 F. 2d 439). Those cases, however, are distinguishable from the instant case for the reason that the statutes there construed did not, as does the statute in question, define the word "forthwith" or specify a time certain within which the warrant must be executed. Indeed, such a difference in statutory language has been clearly recognized by the courts. Thus, in State v. Pachesa, 102 W. Va. 607, 135 S. E. 908, 910 (1926), where the applicable statute failed to require any definite period of time for

---

[2] Of course, in the instant case, appellants' failure to raise in the trial court any question respecting seasonable execution of the search warrant deprived the Government of an opportunity to show the reason or reasons for the intervention of the five-day period which preceded execution of the warrant.

> by this court during a period of nearly a hundred years, in which [though] the statute has been the subject of renewed legislative consideration and of many changes, it has always retained the language which was construed, * * * that we are at liberty to give that language a new meaning, when it is used in reference to the same subject matter."

And in New York Credit, supra, the Court said (276 F. 2d at 888):

> " * * * Both of these earlier provisions were considered by the Court of Appeals, and we think that in enacting § 56(b) Congress intended to adopt the interpretation that had already been placed upon this language by the courts. As has often been said, when Congress uses language having a recognized construction from former acts, it will be supposed to have used the words in the same sense in which they were previously used, in the absence of any indication of a contrary legislative intent."

Applying the above principle to the instant case, it is abundantly clear that the statutory language in question has been in existence for almost fifty years and has repeatedly and consistently been construed to mean that execution of a search warrant at any time within ten days of its issuance is seasonable execution.[1] It is likewise clear that,

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[1] See Cornelius, Search and Seizure, 2d Ed., 1930, § § 215, 230, pp. 515, 541; Varon, Searches, Seizures and Immunities, 1961 Ed., Vol. 1, Chapter VII, § 6, p. 390; Davis, Federal Searches and Seizures, 1964 Ed., § 2.64, p. 85.

permits ten days." [Footnote omitted.]

As recently as July 1, 1966, the Federal Rules of Criminal Procedure were again amended. While certain rules were revised in the light of conflicting court decisions, Rule 41 still remains unchanged. It is quite significant that no court in the Federal Judiciary has given the oft-repeated statutory language in question a construction such as that now urged by appellants. And the revisors of the Federal Rules of Criminal Procedure were undoubtedly familiar with such decisions, and, for that matter, with the concurring opinion in this Court's Mitchell case, supra, urging a contrary construction.

It is a cardinal rule of statutory construction that when the courts have placed a construction on statutory language and such language is thereafter considered by the legislature and permitted to stand unchanged, it is presumed that the legislature adopts the language as construed. See Smith v. Lyon, 133 U. S. 315 (1890); United States v. Dixon, 347 U. S. 381 (1954); District of Columbia v. Johnson & Wimsatt, 82 U. S. App. D. C. 81, 160 F. 2d 913 (1947); New York Credit Men's Adj. Bur. v. A. Jesse Goldstein & Co., 276 F. 2d 886 (2nd Cir., 1960).

In Smith v. Lyon, supra, the Court said (133 U. S. at 319):

> "We do not think, in the light of this long-continued construction of the statute

> 10 days within which a search warrant must be executed and returned to the judge or commissioner who issued it, and, as this warrant was executed and returned within less than 10 days after its date, it was seasonably executed."

Rule 41 of the Federal Rules of Criminal Procedure (which became effective in 1946) is, like both § 33-414 and § 25-129, D.C. Code, 1961, nothing more than a codification of the search and seizure provisions of the Espionage Act of 1917. See Baron, Federal Practice and Procedure, Vol. 4 (Criminal), § 2401, p. 348; and see the note of the advisory committee following the text of the rule. Courts which have construed Rule 41, as well as the courts which have construed the Espionage Act, have invariably held that execution of a search warrant at any time within 10 days of its issuance is seasonable. See Mitchell v. United States, supra; United States v. Klapholz, 17 F. R. D. 18, 24 (D.C., S.D.N.Y., 1955), aff'd. 230 F. 2d 494 (2nd Cir., 1956); United States v. Doe, 19 F. R. D. 1 (D.C. Tenn., 1956). In Klapholz, supra, the court said (17 F. R. D. at 24):

> "As to the defendants' further contention that the warrant is invalid because it was not seasonably executed, nothing more need be said than that the warrant was executed in two days, well within the period specified in Rule 41(d), which

him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

* * *

"Sec. 11. A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void." [Emphasis added.]

Federal Courts construing the Espionage Act have held with consistency that execution of the search warrant at any time within the ten-day period following its issuance constitutes compliance with the statutory mandate. See Sgro v. United States, 287 U. S. 206 (1932); Murby v. United States, 2 F. 2d 56 (1st Cir., 1924); Benton v. United States, 70 F. 2d 24 (4th Cir., 1934). In Murby, supra, the Court said (2 F. 2d at 57):

> "We are also of the opinion that the warrant was seasonably executed. Section 11 of the Espionage Act (40 Stat. 229 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496 1/4k]) limits the time to

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1965

DCCA #3794

No. 20,090

ALEXANDER UNDERDOWN AND WILLIAM V. LAWS,
Petitioners

v.

DISTRICT OF COLUMBIA,
Respondent

United States Court of Appeals
For the District of Columbia Circuit
Filed July 19, 1966
Nathan J. Paulson, Clerk

Before: Burger, Tamm and Leventhal, Circuit Judges, in Chambers.

ORDER

On consideration of petitioners' petition for allowance of an appeal from a judgment of the District of Columbia Court of Appeals, of petitioners' brief in support thereto, and of respondent's brief in opposition thereto, it is

ORDERED by the court that the aforesaid petition be granted, limited to the question whether, under the circumstances of this case, the search warrant was executed "forthwith" in accordance with the pertinent statute.

Per Curiam.

Circuit Judge Burger did not participate in the foregoing order.

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 20,090

ALEXANDER H. UNDERDOWN,
and
WILLIAM LAWS,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The District Of Columbia
Court Of Appeals

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STATEMENT OF QUESTIONS PRESENTED

In granting appellants' petition for the allowance of an appeal from the judgment of the District of Columbia Court of Appeals, this Court limited the appeal to the question:

> "* * * whether, under the circumstances of this case, the search warrant was executed 'forthwith' in accordance with the pertinent statute?"

In the opinion of appellee, fairly comprised in this question are the following subsidiary questions:

1. Whether appellants' failure to raise in the trial court the question of seasonable execution of the search warrant precludes them from raising it in this Court?

2. Whether, in any event, the admission of evidence emanating from the search of appellants' premises was prejudicial error?

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 20,090

ALEXANDER H. UNDERDOWN,
and
WILLIAM LAWS,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The District Of Columbia
Court Of Appeals

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

Appellants were convicted in the Criminal Division of the District of Columbia Court of General Sessions of keeping and selling alcoholic beverages on December 5, 1965, without a license, and were acquitted of keeping for sale alcoholic beverages on December 19, 1965, without a license (J. A. 12, 17). The judgments of conviction were affirmed by the District of Columbia Court of

Appeals, which rejected appellants' contentions that the warrant commanding the search of the premises on which the offenses occurred was improperly issued and unseasonably executed (J.A. 19-22).

By order entered July 19, 1966, this Court granted appellants' petition for the allowance of an appeal, specifically confining the appeal to the question of seasonable execution of the search warrant (J.A. 23).

The search warrant was issued on December 14, 1965, on the basis of the affidavit of a police officer, and was executed at 2:05 a.m. on the following Sunday, December 19, 1965 (J.A. 6).

Briefly stated, the facts set forth in the affidavit are that the police officer and a female companion went to the premises in question at about 2:20 a.m. on Saturday, December 5, 1964, and were seated at a table with another couple. The officer ordered two shots of scotch and meals for himself and his companion from appellant Underdown, who personally served such food and beverages. The officer thereafter inquired of appellant Underdown as to the amount of his bill and was told to "go up to the bar, the bartender has your bill." Upon leaving, the officer observed about twenty persons eating and consuming alcoholic beverages on the premises. Concluding his affidavit, the officer stated that he returned to the

premises at about 12:40 a.m. on Sunday, December 13, 1964, but was refused admittance by appellant Underdown because he was not a member of the club or in the company of a member (J.A. 3, 14).

Appellants did not, in their motion to suppress (J.A. 18) or at any other time, raise in the Court of General Sessions the question of seasonable execution of the search warrant.

SUMMARY OF ARGUMENT

I

Where a statute requires a United States Commissioner to command the "forthwith" execution of a search warrant, but also provides that such warrant "must be executed * * * within ten days" of its issuance, execution at any time within the ten-day period is seasonable. Statutes to this effect have been in existence for almost half a century, have consistently been construed by the Federal Judiciary to mean that execution of the search warrant at any time within ten days of its issuance is seasonable execution and, as thus construed, have been repeatedly considered by Congress and permitted to stand unchanged.

II

A search warrant is executed forthwith when it is executed with that reasonable promptness required by the facts and circumstances of each case. The reason for such a rule is that search warrants are directed to existing violations of law rather than to contemplated ones. Because the after-hours "club" involved in the instant case was engaged in a continuing business in the illicit sale of liquor, the reason for the rule was not subverted by the intervention of a mere five-day period between the issuance of the search warrant and its execution.

III

Appellants' failure to raise in the trial court the question of seasonable execution of the search warrant precludes their raising it in this Court. Moreover, even if they are now permitted to raise the question, the admission into evidence of the fruits of the search, if erroneous, was, at most, harmless error. Because both appellants were acquitted of unlawfully keeping alcoholic beverages for sale on the date of the seizure, they were plainly not prejudiced by the introduction into evidence of the seized liquor.